

BETWEEN:

FERTILITY CONTROL CLINIC (A FIRM)

Plaintiff

and

MELBOURNE CITY COUNCIL

Defendant

**SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY AND
HUMAN RIGHTS COMMISSION**

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INTRODUCTION

1. On 13 November 2014, the Melbourne City Council (**Defendant**) filed an Amended Notice to the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission (**Commission**) under s 35 of the *Charter of Human Rights and Responsibilities Act 2006* (**Charter**).
2. In the Amended Charter Notice, the Defendant poses the following questions:
 - 2.1. with respect to the interpretation of a statutory provision in accordance with s 32(1) of the Charter (**Question 1**) –

Whether the interpretation of the term ‘nuisance’ in Division 1 of Part 6 of the *Public Health and Wellbeing Act 2008* (Vic) (**PHW Act**) sought by the Plaintiff in this proceeding would contravene s 32(1) of the Charter by unjustifiably limiting the rights in ss 14, 15 and 16.
 - 2.2. with respect to a question relating to the application of public authority obligations under s 38(1) of the Charter (**Question 2**) –

Whether the Defendant is required to comply with s 38(1) of the Charter in determining what action to take to abate any nuisance arising in its municipality, when performing functions and exercising powers pursuant to ss 60 and 62 of the PHW Act.
3. The Commission submits that the questions in the Amended Charter Notice be answered as follows:

3.1. Question 1 – No.

3.2. Question 2 – Yes.

ROLE OF THE COMMISSION IN THIS PROCEEDING

4. On 24 November 2014, the Commission notified the Principal Registrar of the Supreme Court of Victoria that it would intervene in this proceeding pursuant to s 40 of the Charter.
5. The Commission's role as intervener is to assist the Court. It is no part of the Commission's intervention to advance the claims of either party, to side with any particular party, or to intervene in any factual contest between the parties.
6. This proceeding raises a range of Charter rights. The Commission's submissions are intended to assist the Court with the mechanisms provided by the Charter for balancing the Charter rights of various persons relevant to the proceedings.

CHARTER OVERVIEW

7. The Charter's main purpose is to protect and promote human rights by providing a framework which, relevantly:¹
 - 7.1. sets out the human rights that Parliament specifically seeks to protect and promote (Part 2);
 - 7.2. ensures that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights (s 32(1));
 - 7.3. imposes an obligation on all public authorities to act in a way that is compatible with human rights (s 38(1)); and
 - 7.4. confers jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human right and requiring the relevant Minister to respond to that declaration (ss 36 and 37).
8. The human rights protected by the Charter in Part 2 are civil and political rights, which are primarily derived from the International Covenant on Civil and Political Rights 1966 (ICCPR).² Charter rights are those of individuals, rather than entities such as a corporation or a body politic.³
9. In respect of Question 1, the Commission submits that:
 - 9.1. Section 32(1) is directed at the interpretation of legislation. It provides that 'So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'.
 - 9.2. This provision applies to all Victorian statutes (and subordinate instruments), including the PHW Act. All persons who interpret legislation, including the Defendant and the Court, are obliged to comply with s 32(1).

¹ Charter, s 1(2).

² Explanatory Memorandum, *Charter of Human Rights and Responsibilities Act 2006* (Vic) 2822.

³ Charter, s 6(1).

- 9.3. Section 32(1) has been interpreted as applying to the interpretation of statutes '*in the same way as the principle of legality but with a wider field of application*'.⁴
- 9.4. Section 32(2) allows for reference to relevant international sources when interpreting a statutory provision.
- 9.5. The main Charter rights which are potentially relevant in this proceeding are:
- The right to freedom of expression (s 15(2));
 - The right to freedom of religion (s 14);
 - The right to peaceful assembly (s 16); and
 - The right to privacy (s 13(a)).
- 9.6. Charter rights are not absolute. There can be limitations or restrictions on certain rights. As to the types of any restriction or qualification to a human right or the manner in which a human right may be enjoyed, the Charter sets out when and how a restriction operates. There are two ways in which the Charter does this. The first is that some Charter rights are subject to 'definitional' or 'internal limitations'. An example of the former is s 16(1) on the right to *peaceful* assembly (s 16(1), which does not confer a right to engage in violent assemblies or a riot.⁵ An example of the latter is s 13(a), which provides that a person has the right not to have his or her privacy, family, home or correspondence *unlawfully* or *arbitrarily* interfered. The second way in which a Charter right may be limited is by the general limitation clause in s 7(2). It applies to all Charter rights. It provides that:
- A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –*
- (a) *the nature of the right;*
- (b) *the importance of the purpose of the limitation;*
- (c) *the nature and extent of the limitation;*
- (d) *the relationship between the limitation and its purpose; and*
- (e) *any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.*
- 9.7. Further s 7(3) states: '*Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person*'. This means that one set of human rights cannot be used to nullify another person's rights. In practice,

⁴ The principle of legality provides that Parliament is presumed not to abrogate or curtail fundamental common law rights and freedoms except by 'clear and unequivocal' language to the contrary. It 'requires that statutes be construed, where constructional choices are open, to avoid or minimise their encroachment' upon such rights and freedoms: see *Momcilovic v The Queen* (2011) 245 CLR 1, 46 [43] per French CJ.

⁵ Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd ed, 2013) 646 [19.05] and Richard Clayton QC and Hugh Tomlinson QC, *The Law of Human Rights* (2nd ed, 2009) 1575

this means that where human rights appear to clash or be in conflict, the task is to determine how both sets of rights can operate. Sometimes this is referred to as striking a balance⁶ but perhaps more accurately it requires a careful analysis as to the limits which might be placed on the apparently competing or conflicting sets of human rights. The internal limitation clauses and s 7(2) of the Charter provide the means for doing this.

- 9.8. The Commission deals with the specific application of s 32(1) and the Charter rights in this proceeding at paragraphs [11]-[57].
10. In respect of Question 2, the Commission submits that:
 - 10.1. Section 38(1) imposes obligations on public authorities. It provides that 'it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right'.
 - 10.2. Public authorities are defined by s 4 of the Charter. Section 38(1) applies to the Defendant, but does not apply to the Court except when it is acting in an administrative capacity.⁷
 - 10.3. Section 38(1) imposes two distinct obligations. The first is a substantive obligation to act compatibly with human rights. The second is a procedural obligation to give proper consideration to relevant human rights in making decisions.
 - 10.4. A breach of either obligation renders conduct unlawful unless, under s 38(2), the public authority could not have acted differently as the result of a statutory provision.
 - 10.5. Section 7(2) applies to the question of whether a public authority acts compatibly with human rights, and in giving proper consideration to relevant human rights.⁸
 - 10.6. The main Charter rights potentially relevant to the application of s 38(1) are the same as those set out in paragraph [9.5], with the addition of the right to equality in s 8(3).
 - 10.7. The Commission deals with the specific application of s 38(1) and the Charter rights in this proceeding at paragraphs [58]-[67].

QUESTION 1: THE INTERPRETATION ISSUE

The term 'nuisance'

11. The parties agree that the Court must construe s 58 of the PHW Act (which is contained in Division 1 of Part 6). In particular, the Court must construe the meaning

⁶ Explanatory Memorandum, *Charter of Human Rights and Responsibilities Act 2006* (Vic) 2830.

⁷ Charter, s 4(1)(j).

⁸ See *PJB v Melbourne Health & Anor (Patrick's case)* [2011] VSC 327, [304]-[306]; *Sabet v Medical Practitioners Board* (2008) 20 VR 414, [108]. See also *Momcilovic v The Queen* (2011) 245 CLR 1, [165]-[168] per Gummow and Hayne JJ; 165-6 [416] per Heydon J; 249 [681] per Bell J; cf 43 [32] per French CJ; Crennan and Kiefel JJ did not take a view on the issue.

of the term 'nuisance' as used in that provision. The expression is not defined by the PHW Act.

12. The parties appear to accept that in the context of s 58 of the PHW Act, the meaning/scope of the term 'nuisance' is not clear. The Plaintiff says that 'nuisance' under the PHW Act has its ordinary meaning. The Defendant says that 'nuisance' has a technical/legal meaning, namely, 'an actionable interference against land'. The Defendant seeks to confine the meaning of 'nuisance' to private nuisances. For the reasons outlined in the following submissions, the Commission contends that if the expression 'nuisance' is construed in accordance with s 32(1) of the Charter, the expression should include any form of nuisance be they private and/or public nuisances. It has been recognised that protests can sometimes amount to public nuisances.⁹

Section 32(1) of the Charter – general principles

13. As to the Charter, s 32(1) requires the provisions of the PHW Act, including Division 1 of Part 6, to be interpreted in a way that is compatible with Charter rights, so far as it is possible to do so consistently with their purpose.
14. The operation of s 32(1) of the Charter was considered by the High Court in *Momcilovic v The Queen*.¹⁰ In *Slaveski v Smith*,¹¹ the Court of Appeal (per Warren CJ, Nettle and Redlich JJA) summarised the High Court's approach as follows:

*... if the words of a statute [sic] are clear, the court must give them that meaning. If the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question. Exceptionally, a court may depart from grammatical rules to give an unusual or strained meaning to a provision if the grammatical construction would contradict the apparent purpose of the enactment. Even if, however, it is not otherwise possible to ensure that the enjoyment of the human right in question is not defeated or diminished, it is impermissible for a court to attribute a meaning to a provision which is inconsistent with both the grammatical meaning and apparent purpose of the enactment.*¹²

15. According to the Court of Appeal, s 32(1) '*applies in the same way as the principle of legality with a wider field of application*'.¹³ This approach has been consistently applied by the Court of Appeal in subsequent cases. For example, in *Nigro v Secretary to the Department of Justice*, the Court of Appeal explained that s 32 does not establish a new paradigm of interpretation.¹⁴
16. Applying the approach set out in *Slaveski*, if the term 'nuisance' is capable of more than one meaning, then the Court should give the term the meaning that best accords with the Charter rights in question. The Commission further proceeds on the basis that an interpretation of 'nuisance' will not be incompatible with Charter rights if it results in limitations on those rights which are reasonable and demonstrably justified

⁹ See, for example, *Animal Liberation (Vic) Inc v Gasser* [1991] 1 VR 51; *City of London v Samede & Ors* [2012] EWHC 34 (QB); and by implication *Hubbard v Pitt* [1976] 1 QB 142, 175 per Lord Denning.

¹⁰ (2011) 245 CLR 1.

¹¹ (2012) 34 VR 206.

¹² *Ibid* 215 [24].

¹³ *Ibid* 219 [45].

¹⁴ (2013) 304 ALR 535, 558 [85].

under s 7(2), as the issue of the application of s 7(2) to s 32(1) does not appear to be disputed by the parties.¹⁵ However, it is important to give careful consideration to the nature of the human rights in issue.

17. The following submissions turn to consider each of the Charter rights relied upon by the Defendant (namely, the right to freedom of expression in s 15(2), the right to freedom of religion in s 14, and the right to peaceful assembly and right to freedom of association in s 16), which it says would be unjustifiably limited if the Plaintiff's interpretation of 'nuisance' is accepted.
18. Having regard to the relevant Charter rights, the Commission submits that the Plaintiff's interpretation of the term 'nuisance' in the PHW Act best accords with the Charter rights in question and is not incompatible with Charter rights.

The right to freedom of expression (s 15(2) and (3))

19. Section 15(2) of the Charter provides that:

Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether—

(a) orally; or

(b) in writing; or

(c) in print; or

(d) by way of art; or

(e) in another medium chosen by him or her.

20. The right to freedom of expression belongs to an individual, rather than a group as a whole. Section 15(2) recognises an individual's freedom to express opinions and views of any kind. Importantly, the right applies in three ways:
 - (a) to the content of the expression (substance of the expression);
 - (b) to the manner or form in which the content is conveyed (manner of expression); and
 - (c) the right applies to the person who conveys the content and the person who receives or seeks out the content.
21. As to the substance of the expression, the right to freedom of expression applies 'not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.'¹⁶ The Defendant does not appear to dispute that the content of the expression by the protesters can be considered offensive.¹⁷

¹⁵ The operation of s 32(1) is not entirely resolved. The High Court's decision in *Momcilovic* did not 'yield a single or majority view as to what is meant by interpreting a statutory provision in a way that is compatible with human rights': *WK v The Queen* [2011] VSCA 345, [55] per Nettle JA. In particular, the High Court's decision in *Momcilovic* provides no *ratio* in relation to whether, in applying s 32(1), s 7(2) of the Charter has any role to play. Although the Court of Appeal has noted the lack of binding authority on the s 7(2) – s 32 issue, it has not yet resolved the issue. The matter is thus at large: see *Noone v Operation Smile (Australia) Inc* [2012] VSCA 91, [27]-[31] per Warren CJ and Cavanough AJA, cf [139]-[142] per Nettle JA; *Nigro v Secretary to the Department of Justice* (2013) 304 ALR 535, 558-9 [87]-[88].

¹⁶ *Handyside v United Kingdom* (1976) 1 EHRR 737, [49].

¹⁷ Defendant's submissions dated 3 November 2014, Court Book, pg 0385, paras [41]-[42].

22. As to the manner of the expression, the right to freedom of expression also extends to the 'manner' and 'form' of the protest',¹⁸ which 'may constitute the actual nature and quality of the protest'.¹⁹
23. The Commission refers to the positions of the parties on the factual issues as outlined in their submissions. The Defendant characterises the Plaintiff's 'real complaint' as being about the 'content' of the communications by the protesters, which is said to be harmful or offensive to the staff and clients of the Plaintiff. The Plaintiff rejects the Defendant's characterisation, and says that it is manner in which the protesters seek to express their views ('such as blocking the path, jostling people, approaching women to prevent their entry to the Clinic's premises, assault and battery') combined with their communications that are said to constitute a nuisance.
24. The Defendant's characterisation of the facts is a critical limb in the Defendant's submissions concerning the Charter and the approach to answering Questions 1 and 2. The Commission submits that the characterisation of the factual issues will have a material bearing on the resolution of the Charter issues.
25. The Commission submits that the available evidence does not support the Defendant's characterisation of the complaint being directed primarily to the content or substance of the communications. Rather, the evidence relied on by the Plaintiff is also directed to concerns about the *manner* in which the protesters' views are communicated. In summary, the evidence includes:
- 25.1. At various times during the week, three to 12 protesters regularly stand outside the Plaintiff's entrance (on at least Monday to Saturday between 7:30 am and 10:00 am). On Saturday morning each month, a larger group of 50 to 100 protesters attend. Protesters conduct vigils outside Plaintiff's premises for the entire day for 40 consecutive days,²⁰ during such time protesters have sometimes walked out into traffic lanes and amongst traffic.²¹
- 25.2. Protesters walk next to and follow women entering or leaving the Plaintiff's premises, including when the women make it clear the protesters are unwelcome.²²
- 25.3. Protesters try to force people entering or passing by to take their brochures, including chasing them down an alleyway (from which the clinic's back entrance is accessible).²³
- 25.4. Protesters stick their heads in the windows of car doors²⁴ and block people getting out of cars outside the clinic and obstruct the car door stopping the people from getting out.²⁵

¹⁸ *City of London v Samede & Ors* [2012] EWHC 34 (QB), [100] per Lindblom J.

¹⁹ *City of London v Samede & Ors* [2012] EWHC 34 (QB), [100] citing *Tabernacle v The Secretary of State for Defence* [2009] EWCA Civ 23, [37] per Laws LJ.

²⁰ Plaintiff's submissions dated 13 October 2014, Court Book, page 0367, para [8].

²¹ Affidavit of Janice Nugent dated 11 June 2014, Court Book, page 0334, para [12].

²² Plaintiff's submissions dated 13 October 2014, Court Book, page 0368, para [11.1].

²³ Affidavit of Tariq Al-Zabidi dated 12 June 2014, Court Book, page 0341, para [12(a)], [12(c)], [12(e)].

²⁴ Affidavit of Susie Allanson dated 11 March 2014, Court Book, page 0020, para 20(a); and Affidavit of Janice Nugent dated 11 June 2014, Court Book, page 0336, para [21].

²⁵ Affidavit of Tariq Al-Zabidi dated 12 June 2014, Court Book, page 0341, para [12(d)].

- 25.5. Protesters try to block women's entry into the clinic and block the entry to the clinic across the width of the footpath.²⁶
- 25.6. Protesters threaten, verbally abuse and harass patients and staff of the Plaintiff.²⁷
- 25.7. Protesters engage in arguments with people entering or leaving the Plaintiff's premises or passing the area.²⁸
- 25.8. Protesters sometimes jostle and hit people passing the area and patients.²⁹
- 25.9. Protesters sing, pray and yell, which can be heard by patients and staff within the clinic, including in waiting, treatment and consultation rooms.³⁰
26. The issue requires consideration of whether the manner in which a person expresses views may be limited if the manner causes a nuisance (within the meaning of the PHW Act) or interferes with the rights of other persons.
27. Section 15(3) provides for an 'internal limitation' on the right. It permits certain restrictions to be placed on free expression in limited, proscribed circumstances. Section 15(3) states that:

Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—

(a) to respect the rights and reputation of other persons; or

(b) for the protection of national security, public order, public health or public morality.
28. The respect for the 'rights of other persons' in s 15(3)(a) and the protection of 'public order' and 'public health' under s 15(3)(b) are relevant to the interpretation of Division 1 of Part 6. They are addressed further below.

Respect for the rights of other persons (s 15(3)(a))

29. The scope of the respect for the 'rights of other persons' in s 15(3)(a) includes the rights of human beings protected by the Charter and at common law. In this proceeding, the relevant rights of other persons include: the right to privacy in s 13(a) of the Charter of both patients and staff of the Plaintiff and various common law rights of patients, staff, general public and property owners. The Commission submits that the rights of other persons also encompasses human rights recognised at international law.³¹
30. Although it may be that the 'rights of other persons' potentially extends to matters which are not considered 'rights' in the strict sense,³² that is not a proposition relied

²⁶ Plaintiff's submissions dated 13 October 2014, Court Book, page 0368, para [11.2].

²⁷ As to staff, see for example, Affidavit of Susie Allanson dated 11 March 2014, Court Book, page 0026, para [52]; Affidavit of Louis Rutman dated 10 June 2014, Court Book, page 0330, para [5]; Affidavit of Janice Nugent dated 11 June 2014, Court Book, page 0335, para [17].

²⁸ Plaintiff's submissions dated 13 October 2014, Court Book, page 0368, para [11.1].

²⁹ Plaintiff's submissions dated 13 October 2014, Court Book, page 0368, para [11.2].

³⁰ Plaintiff's submissions dated 13 October 2014, Court Book, page 0368, para [12].

³¹ Human Rights Committee, General Comment 34: Article 19: *Freedoms of opinion and expression*, 102nd sess. UN Doc. CCPR/C/GC/34 (2011) [28].

³² See the *obiter* remarks in *Noone v Operation Smile (Australia) Inc* [2012] VSCA 91, [154] per Nettle JA; and *Magee v Delaney* (2012) 39 VR 50, 74 [125].

upon by the Plaintiff. The Commission submits that this is not a point which is necessary to decide in this proceeding.

The right to privacy (s 13(a))

31. Section 13 relevantly provides that a person has the right '*not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with*'.
32. The scope of the right to privacy is broad. Privacy is a concept that is not susceptible to exhaustive definition.³³ In respect of the equivalent right to private life in Article 8(1) of the European Convention on Human Rights (ECHR), pregnancy, abortion and sexual life are considered to be 'part of private life'. That is because privacy comprises 'to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field, for the development and fulfilment of one's own personality'.³⁴
33. The right to privacy also extends to the work sphere. In *ZZ v Secretary, Department of Justice & Anor*, Bell J summarised the European jurisprudence on the right to private life under Article 8 of the ECHR as follows:³⁵

... private life 'encompasses the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature'.³⁶ Article 8 of the Convention thus 'protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world'.³⁷ The notion of 'private life' does not in principle exclude 'activities of a professional or business nature. It is, after all, in the course of their working lives that the majority of people have a significant opportunity of developing relationships with the outside world'.³⁸
34. In *Harlan Laboratories UK Ltd v Stop Huntingdon Animal Cruelty*,³⁹ the High Court of England and Wales considered the human rights compatibility of granting a permanent injunction which would place restrictions on 'anti-vivisectionist' protesters demonstrating at or near a premises which bred animals for medical and clinical research. The Court considered the apparent conflict or clash of the right to freedom of expression (and the right to peaceful assembly) of the protesters against the right to private and home life of employees under Article 8 of the ECHR. Justice Lang held that an '*intrusive interference with an employee's journey to and from work [...] will potentially breach Article 8*'.⁴⁰ Her Honour went on to grant the permanent injunction, which permitted protests in a designated area opposite the premises, and '*prevented*

³³ See *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368, [9]; *Pretty v United Kingdom* (2002) 35 EHRR 1, [61]; *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [593], [599].

³⁴ *Brüggemann and Scheuten v Germany*, European Commission of Human Rights, App Np. 6959/75, 12 July 1977 (Admissibility decision); see further *Brüggemann and Scheuten v Germany* (1977) 3 EHRR 244, 252; and *Tysiac v Poland* (2007) 45 EHRR 42, [105]-[107]. The United Nations Human Rights Committee has also found violation of the right to privacy in Article 17 of the ICCPR in circumstances where a decision was taken on behalf of a person, and against their wishes for lawful termination of their pregnancy: *KNLH v Peru*, Human Rights Committee, Communication No. 1153/2003, 14 August 2006, [6.4]; *LMR v Argentina*, Human Rights Committee, Communication No. 1608/2007, 28 April 2011, [9.3].

³⁵ [2013] VSC 267.

³⁶ *C v Belgium* (2001) 32 EHRR 2, 33-4 [25].

³⁷ *Pretty v United Kingdom* (2002) 35 EHRR 1, 36 [61].

³⁸ *Volkov v Ukraine* [2013] ECHR 32, [165] citing *Niemietz v Germany* (1993) 16 EHRR 97, 111 [29].

³⁹ [2012] EWHC 3408 (QB).

⁴⁰ *Ibid* [67].

protestors blocking a car's path, while shouting at the occupant, and banging on the car, which has been intimidating'. Conditions were also imposed, amongst other things, to control noise, and limit the frequency, duration of protests, and the number of protesters.⁴¹ Justice Lang noted that in considering proportionality, she had taken into account the ability of protesters to conduct protests at locations away from the premises, and communicate their message to a wider audience via internet and the press.⁴²

35. The Commission submits that impeding a person's ability to access lawful reproductive health services, and intrusive interferences on a person travelling to and from work, and while at work, will engage, and likely limit, the right to privacy. Protesters are not authorised to impede a person from accessing lawful, reproductive health services or to go about their lawful work. Moreover, protesters can convey the same opinions and views they hold in a peaceful and unobtrusive manner.

Protection of public order and public health (s 15(3)(b))

36. The protection of 'public order' in s 15(3)(b) was described in *Magee v Delaney* as '*giving effect to rights or obligations that facilitate the proper functioning of the rule of law.*' It is '*a wide and flexible concept and includes measures for peace and good order, public safety and prevention of disorder and crime.*'⁴³ In *Magee*, Kyrrou J gave an example of a lawful restriction on the basis of public order, which is equally applicable here – '*laws that enable citizens to engage in their personal and business affairs free from unlawful physical interference to their person and property.*'⁴⁴ However, the Commission submits that the restriction must relate to conduct which is sufficiently serious to amount to a disruption of public order. It should be restricted for reasons of public order only where there is '*a clear danger of disruption rising far above annoyance.*'⁴⁵
37. The concept of protecting 'public health' in s 15(3)(b) has yet to be judicially considered. Guidance on its possible meaning may be obtained from the *Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR*, which state that public health may be invoked as a ground for limiting the right to freedom of expression '*in order to allow a State to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.*'⁴⁶
38. Looking to the terms of the PHW Act, it is evident that the legislation has been enacted for the purposes of protecting public order and public health. As to public health, this is reflected in the purpose⁴⁷ and objectives⁴⁸ of the PHW Act. The same could be said of Division 1 of Part 6 of the PHW Act, which only applies to 'nuisances'

⁴¹ Ibid [70].

⁴² Ibid [78].

⁴³ *Magee v Delaney* (2012) 39 VR 50, 79 [151].

⁴⁴ Ibid.

⁴⁵ *Brooker v Police* [2007] 3 NZLR 91, [42]-[43] per Elias J; see also [56]-[59] per Blanchard J, [90] per Tipping J. Applied by the Magistrates Court of Victoria in *VPol v Anderson & Ors (Criminal)* [2012] VMC 22, [64]-[69] per Magistrate Garnett.

⁴⁶ Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 41st sess. UN Doc. E/CN.4/1985/4 (1984) [25].

⁴⁷ See PHW Act, s 1.

⁴⁸ See PHW Act, s 4, particularly sub-s (2).

which are, or are liable to be, ‘dangerous’ to health or ‘offensive’ (in the sense of being ‘noxious or injurious to personal comfort’). As such, those provisions are clearly for the purposes of protecting the health of, and preventing disease or injury to, the general public and individuals in Victoria. In respect of public order, it is notable that the definition of ‘offensive’ under the PHW Act is narrower than under the preceding *Health Act 1958* (Vic), which encompassed ‘annoying’ to personal comfort.⁴⁹ There can be no argument that remedying nuisances of such a serious effect (‘dangerous’, ‘noxious’ or ‘injurious’, not merely ‘annoying’) would also be for the protection of ‘peace and good order’, ‘public safety’ and, potentially, the ‘prevention of disorder’.

39. The factual circumstances can also inform the reasonableness of a restriction for the purposes of public order.⁵⁰ Assuming that the Plaintiff’s characterisation of the factual issues is correct, there is ‘a clear danger of disruption rising far above annoyance’. Conduct in the form of a protest will be sufficiently serious to constitute a disruption of public order where the protest impedes persons from accessing lawful reproductive health services and obstructs staff of such services from going about their lawful work.
40. By analogy and accepting that the High Court has cautioned against recourse to comparative jurisprudence on the First Amendment of the United States Constitution⁵¹ – the proposition that the right to freedom of expression is not absolute can be helpfully illustrated by reference to that jurisprudence.

First Amendment of the United States Constitution and *Canadian Charter of Rights and Freedoms*

41. The First Amendment relevantly provides that ‘Congress shall make no law [...] abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances’. It is regarded as almost absolute. Despite this, the United States Supreme Court has held that freedom of speech under the First Amendment does not include the right to a ‘captive’ or ‘unwilling’ audience for offensive speech.⁵² That approach has been applied in relation to protesters outside health clinics. In *Hill v Colorado*, the Supreme Court said that the right to freedom of speech ‘includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker’s message may be offensive to his audience’. However, ‘protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it’.⁵³
42. Persons seeking to enter reproductive health clinics are a ‘captive’ or ‘unwilling’ audience, in that they cannot avoid exposure to protests positioned directly outside of entrances to those clinics. This approach has been adopted in the same context in

⁴⁹ Section 40(1), Part 3. That Act similarly imposed a duty on councils to remedy and investigate nuisances.

⁵⁰ *Magee v Delaney* (2012) 39 VR 50, 71 [106]–[107]; 80 [152].

⁵¹ *United States Constitution* amend I (1791).

⁵² *Frisby v Schultz* 487 US 474 (1988).

⁵³ 530 US 703 (2000) 716.

Canada with respect to the right to freedom of expression in s 2(b) of the *Canadian Charter of Rights and Freedoms*.⁵⁴

43. Speaking more broadly (and in a way which echoes the permissible restrictions on free expression in s 15(3) of the Charter), the United States Supreme Court has 'recognized the legitimacy of the government's interests in "*ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services*."' ⁵⁵ In this respect, restrictions on the manner in which a protest may take place are relevant to the extent to which the freedom may be limited.
44. The Supreme Court has in several cases upheld (or partly upheld) 'buffer' or 'bubble' zones which banned protesters from demonstrating outside reproductive health clinics.⁵⁶

The right to peaceful assembly and freedom of association (s 16)

45. Section 16(1) provides that '[e]very person has the right of peaceful assembly, and s 16(2) relevantly provides that '[e]very person has the right to freedom of association with others'.
46. As noted above, the right to peaceful assembly does not confer a right to engage in violent assemblies or a riot.⁵⁷ The right to peaceful assembly is also subject to limitations which are reasonable and demonstrably justified pursuant to s 7(2). A restriction on protest which, even if not characterised as violent (such as a mere blockade to entry of a premises), can potentially be justified in order to respect the rights of other persons and protect public order and public health.⁵⁸
47. It is well accepted that the preservation of order in public places is in the interests of the amenity and security of citizens, and so that they may exercise, without undue disturbance, the rights and freedoms involved in the use and enjoyment of such places.⁵⁹ Put simply, a person's right to engage in peaceful assembly is limited to the extent that the manner on which a person seeks to exercise such a right causes a nuisance.
48. So much is recognised in the equivalent right to freedom of assembly in the ICCPR, which contains internal limitations in Article 21.⁶⁰ The analysis set out earlier in these submissions in respect of the right to freedom of expression and internal limitations in s 15(3) applies equally in this context.

⁵⁴ *R v Spratt* (2008) 235 CCC (3d) 521, [82]-[84] (leave to appeal this decision was refused by the Supreme Court of Canada).

⁵⁵ *McCullen v Coakley* 573 US -- (2014), 19 citing *Schenck v Pro-Choice Network of Western NY* 519 US 357, 376 (1997).

⁵⁶ See *Madsen v Women's Health Center, Inc* 512 US 753 (1994); *Schenck v Pro-Choice Network of Western NY* 519 US 357 (1997); *Hill v Colorado* 530 US 703 (2000); cf *McCullen v Coakley* 573 US -- (2014).

⁵⁷ However, an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if an individual remains peaceful in their own intentions or behaviour: Richard Clayton QC and Hugh Tomlinson QC, *The Law of Human Rights* (2nd ed, 2009) 1575.

⁵⁸ *University of Sydney v Greenland* [1970] 2 NSWLR 350; *La Trobe University v Robinson and Pola* [1972] VR 883; *Meriton Units Pty v Rule* (1983) ACLD 342; and *Hubbard v Pitt* [1976] 1 QB 142.

⁵⁹ Compare *Coleman v Power* (2004) 220 CLR 1, 32; *Monis v The Queen* (2013) 249 CLR 92 and *Morse v The Police* [2012] 2 NZLR 1.

⁶⁰ Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd ed, 2013) 646 [19.06].

The right to freedom of religion (s 14)

49. Section 14 of the Charter provides that:

(1) Every person has the right to freedom of thought, conscience, religion and belief, including—

(a) the freedom to have or to adopt a religion or belief of his or her choice; and

(b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.

(2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

50. The United Nations Human Rights Committee has provided some guidance on the scope of Article 18 of the ICCPR, on which the right to freedom of religion or belief in the Charter was modelled.⁶¹ The Committee has observed:

50.1. the terms ‘belief’ and ‘religion’ are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions;

50.2. Article 18 distinguishes between the freedom to *have or adopt* a religion or belief (internal freedom) and the freedom to *manifest* that religion or belief in worship, observance, practice and teaching (external freedom). Article 18 does not permit any limitations whatsoever on the internal freedom. The external freedom is subject to limitations as provided by Article 18(3).

51. Under the comparative jurisprudence, not all assertions of religious beliefs will necessarily be accepted as such⁶² (and not all acts motivated by a religion or belief are ‘manifestations’ of that belief).⁶³ The Commission submits that the Court must be satisfied on the evidence that the person genuinely holds the religious beliefs they profess (and acts in connection with those beliefs). This should be done without engaging in the examination of the objective validity of the beliefs and without being overly zealous in the investigation of the genuineness of those beliefs.⁶⁴

52. The Commission submits that in the present proceeding, there is no evidence as to the religious beliefs held by the protesters (as members of The Helpers of God’s Precious Infants or otherwise). A simple assertion of the right is not sufficient.

53. In the absence of evidence, the Court should not be asked to engage in a hypothetical consideration of the relevance of or impact on the right to freedom of religion in this proceeding.

⁶¹ Human Rights Committee, *General Comment 22: The right to freedom of thought, conscience and religion (Art 18)*, 48th sess. UN Doc. CCPR/C/21/Rev.1/Add.4 (1993).

⁶² *R (Williamson) v SS Education and Employment* [2005] 2 AC 246, [22]–[23] per Lord Nicholls.

⁶³ *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 1339, 1358 [60]; cited with approval in *R (Williamson) v SS Education and Employment* [2005] 2 AC 246, [63] per Lord Walker. In the context of protests conducted outside and within reproductive health clinics, see also: *Van Schijndel, Heydon and Leeman v The Netherlands*, European Commission of Human Rights, Second Chamber, App No. 30936/96, 10 September 1997; cf the approach in *Van den Dungen v The Netherlands*, App No. 22838/93, 22 February 1995.

⁶⁴ *Holt v Hobbs* -- (US) -- (US Supreme Court) 20 January 2015.

Conclusion on the interpretation issue

54. The Commission submits that the Plaintiff's interpretation of the term 'nuisance' in the PHW Act best accords with the Charter rights in question and does not give rise to any incompatibility with Charter rights.
55. None of the Charter rights which may appertain to the protesters and relied upon by the Defendant are unreasonably or unjustifiably limited by the Plaintiff's interpretation.
56. Restrictions on protests will undoubtedly limit the right to freedom of expression in s 15(2). However, assuming that the Plaintiff's characterisation of the factual issues is correct, permitting restrictions on a nuisance caused by the manner and form of the protest (together with its content) would fall within the internal limitations in s 15(3), particularly respecting the rights of other persons and protecting public order and public health.
57. In respect of the right to peaceful assembly, the right is qualified by reference to the word 'peaceful'. To the extent that the PHW Act permits restrictions on peaceful protests, this can be reasonable and demonstrably justified under s 7(2). In relation to the right to freedom of association in s 16, the relevant provisions of the PHW Act do not in any way prevent free association.

QUESTION 2: THE SECTION 38(1) ISSUE

58. It is the Commission's submission that the Defendant correctly concedes that it is a public authority and is obliged to comply with the obligations set out in s 38(1) of the Charter.⁶⁵ The definition of public authority under the Charter includes 'a Council within the meaning of the *Local Government Act 1989* (Vic).'⁶⁶
59. The Commission makes no submission on whether it is appropriate for the Court to grant mandamus in this proceeding or to the appropriate form of relief.
60. However, the Commission submits that the Charter guides how the Council should proceed in respect of its public authority obligations.
61. Section 38(1) imposes two distinct obligations. The first is a substantive obligation to act compatibly with Charter rights. The second is a procedural obligation to give proper consideration to relevant Charter rights in making decisions.
62. The procedural obligation under s 38(1) to give proper consideration to relevant Charter rights in making a decision was explained by Emerton J in *Castles v Secretary, Department of Justice*.⁶⁷

Proper consideration need not involve formally identifying the 'correct' rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests.

⁶⁵ Defendant's submissions dated 3 November 2014, Court Book, pg 0389, para [58(d)].

⁶⁶ Charter, s 4(1)(e).

⁶⁷ [2010] VSC 310, [185]-[186], cited with approval in *PJB v Melbourne Health & Anor (Patrick's case)* [2011] VSC 327, [311] per Bell J.

There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.

[...] it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified.

63. Further, the substantive obligation under s 38(1) means that not only must Council give proper consideration to relevant Charter rights, but it must also act compatibly with them. In that sense, '*[w]hat matters is the result*'.⁶⁸
64. A breach of either obligation renders conduct unlawful unless, under s 38(2), the public authority could not have acted differently as the result of a statutory provision. Section 38(2) is not applicable here.
65. The Charter rights which are relevant to s 38(1) are identical to those analysed under Question 1, with the addition of the right to equality in s 8(3). Section 8(3) provides that: 'Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination'.
66. Applying s 38(1) to the present circumstances, the Defendant must, in determining what action to take to abate a nuisance, consider and strike a balance between:
 - 66.1.1. the rights of the protesters to freedom of expression in s 15(2) and peaceful assembly in s 16;
 - 66.1.2. the right of the Plaintiff's patients and staff to privacy in s 13(a), and the right of the patients to equality in s 8(3); and
 - 66.1.3. the purpose and objectives of the PHW Act, including Division 1 of Part 6.
67. Having regard to the above, the Commission generally submits that the Defendant would be acting compatibly with Charter rights by permitting the protests, but using the functions, duties and powers available to it to regulate the *manner and form* of those protests – provided that such measures are carefully and appropriately tailored so as to be reasonable and proportionate.

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⁶⁸ *R (SB) v Denbigh High School* [2007] 1 AC 100, [68] per Lord Hoffman; cited in *PJB v Melbourne Health & Anor (Patrick's case)* [2011] VSC 327, [312] per Bell J.